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Road Sprinkler Fitters, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 669 and Cosco Fire Protection, Inc. and National Fire Sprinkler Association, Inc., Party In Interest and Firetrol Protection Systems, Inc., Party In Interest. Case 21-CE-374

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On November 3, 2008, Administrative Law Judge William G. Kocol issued the attached decision dismissing the complaint. The General Counsel and the Charging Party Cosco Fire Protection, Inc. (Cosco) filed exceptions and supporting briefs. The Respondent Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Piping Fitting Industry of the United States and Canada, AFL–CIO (the Union) filed an opposing brief. The General Counsel and Cosco filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

Introduction

The complaint alleges that the Union violated Section 8(e) of the Act by entering into and maintaining addendum C of the 2007-2010 agreement with the National Fire Sprinkler Association, Inc. (NFSA), a multiemployer association. Cosco is a NFSA member and a signatory employer. The second provision of addendum C provides that, in specified circumstances, the terms of the agreement shall apply to operations "establish[ed] or maintain[ed]" by signatory employers to perform bargaining unit work upon a showing of majority support among employees of the operation through either signed authorization cards or an election supervised by a neutral third party. The General Counsel and Cosco argue that this part of addendum C is unlawful because it sought to apply the collective-bargaining agreement to entities whose labor relations the signatory employer does not control. The judge dismissed the complaint. As explained below, we agree that Section 8(e) has not been violated.

I. FACTS

Cosco inspects, installs, and repairs fire suppression devices and alarms. Cosco is owned by the same holding company that owns Firetrol Protection Systems (Firetrol), which performs the same work as Cosco. NFSA has negotiated a series of multiemployer collective-bargaining agreements with the Union, the latest running from April 1, 2007 through March 31, 2010. The agreement defines the unit as including all journeyman and apprentice sprinkler fitters employed by signatory employers to perform work covered by the agreement. Cosco is a member of NFSA and a signatory to its agreement with the Union; Firetrol is neither a member nor a signatory.

In the 2007–2010 agreement, the parties added addendum C, which had not been part of previous agreements. (The full text of addendum C is attached as an appendix to this decision). The first part of addendum C states, in relevant part, that:

In order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of [the Union], under its own name or under the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, where the Employer (including its officers, directors, owners, partners or stockholders) exercises either directly or indirectly (such as through family members) controlling or majority ownership, management or control over such entity, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement.

This provision is conceded to be lawful.

volved in the grievance:

The second provision states, in relevant part, that:

In the event that the Union files, or in the past

has filed, a grievance under Article 3 of this or any

prior national agreement, and the grievance was not

sustained, the Union may proceed under the follow-

ing procedures with respect to the contractor(s) in-

Should the Employer establish or maintain operations that are not signatory to this Agreement, under its own name or another or through another related business entity to perform work of the type covered by this Agreement within the Union's territorial jurisdiction, the terms and conditions of this Agreement shall become applicable to and binding upon such operations at such time as a majority of the employees of the entity (as determined on a state-bystate, regional, or facility-by-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards, pursuant to applicable NLRB standards or in the event of a good faith dispute over the validity of the authorization cards pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of the ratification of this Agreement. The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election. . . .

II. DISCUSSION

Section 8(e) makes it an unfair labor practice for an employer and a union to enter into an agreement requiring the employer to cease doing business with any other person. As the judge explained, however, despite the broad, literal language of Section 8(e), a contract clause is lawful, despite a cease-doing-business objective, if the clause has the primary objective of preserving work performed by the employees of the employer bound by the clause, rather than the secondary objective of "satisfy[ing] union objectives elsewhere." *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 936 (1999) (quoting *NLRB v. Longshoremen ILA*, 447 U.S. 490 (1980)). In other words, "Although 8(e) does not by its terms distinguish between primary and secondary activity, the Supreme Court has held that 'Congress intended

to reach only agreements with secondary objectives." Painters District Council 51 (Manganaro Corp., Maryland), 321 NLRB 158, 163 (1996) (quoting ILA, supra, 447 U.S. at 504, citing NLRB v. Pipefitters, 429 U.S. 507, 517 (1977); National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 620, 635 (1967)). For the reasons discussed below, we conclude that addendum C of the 2007–2010 agreement was lawful. It neither had a secondary objective, nor did it require a signatory to cease doing business with another person.

A

The second provision of addendum C is an "anti-dual shop" clause. The purpose of a properly drafted anti-dual shop clause is to prevent the signatory employer from diverting unit work to an entity not formally bound by the collective-bargaining agreement while continuing to control and profit from the performance of the work. As the Board has explained,

An anti-dual-shop clause is a clause aimed at prohibiting or discouraging a unionized employer's maintenance of an affiliation with a nonunion company in a so-called double-breasting arrangement. Double-breasting is a corporate arrangement, found principally in the construction industry, in which a unionized employer forms, acquires, or maintains a separately managed nonunion company that performs work of the same type as that performed by the affiliated union company.

Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023, 1023 (1993). An anti-dual shop clause is a "tool 'to prevent any device or subterfuge to avoid the protection and preservation of [unit] work." *Manganaro*, supra, 321 NLRB at 165. This is a primary purpose.

We find that the second provision of addendum C is lawful as drafted. The addendum explicitly seeks to preserve unit work. Besides the addendum's proclamation of that objective, the second provision's scope is expressly limited to "work of the type covered by this Agreement within the Union's territorial jurisdiction"—language almost identical to that which the Board in *Manganaro*, supra, found to encompass only bargaining unit work.³

¹ Sec. 8(e), in relevant part, states that:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void

² A contract clause with a secondary objective can still be lawful if it comes within the construction-industry proviso of Sec. 8(e). *Iron Workers (Southwestern Materials)*, supra.

³ The relevant contractual provision in *Manganaro*, supra, stated:

^{1.} To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the of another, as a corporation, company, partnership, or other business entity, including a joint

That fact alone is not dispositive, however. Agreements of the type found in both the first and second provisions of addendum C are lawful only if they are limited to bargaining unit work performed by the subject entities and the signatory employer controls the covered entities. The General Counsel concedes that the first provision of addendum C was properly limited in these respects. For the reasons discussed below, we find that the second provision was also properly limited. Accordingly, we agree with the judge that the General Counsel did not prove that addendum C possessed a secondary objective. Indeed, we hold that it was primary in nature.

As discussed by the judge, the complaint alleges only that addendum C is facially invalid. Therefore, we must construe the second provision's language to comport with Section 8(e) if possible. In *Teamsters Local 982 (J.K. Barker Trading Co.)*, 181 NLRB 515, 517 (1970), the Board explained this rule of construction under Section 8(e): "[W]here the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law." Because the language of the second part of addendum C does not, on its face, clearly extend to entities outside the signatory employer's control, we construe it to extend no farther than permitted by law.

The provision applies only to operations "establish[ed] or maintain[ed]" by the signatory employer. Those words do not compel the conclusion that the provision applies to entities outside the signatory's control. In fact, we agree with the judge that the phrase "should the employer establish or maintain" indicates that the signatory employer exercises control over covered operations at the relevant times. The most natural reading of the phrase is that it is intended to cover two situations: (1) where, during the contract term, the signatory employer creates a new entity; and (2) where, during the contract term, the signatory employer either takes over an existing entity that it did not create or continues to operate an entity that it created before entering into the contract. In both situa-

venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly (including but not limited to management, control or majority ownership through family members) management, control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

321 NLRB at 162.

tions, the employer necessarily controls the entity. If an employer *establishes* an entity, triggering addendum C, it exercises control over it. If the employer *maintains* an entity, also triggering addendum C, it exercises control over that entity by continuing it in operation. Thus, contrary to the General Counsel's suggestion, the fact that the second provision does not specifically refer to "control" of unit work is not dispositive of this issue.

In addition, the operative provisions of the addendum reflect an assumption that it applies only to operations controlled by the signatory employer. The second provision does not prevent the employer from establishing or maintaining an operation that is not a signatory to perform unit work. Rather, it provides that if the employer establishes or maintains such an operation, the operation will be covered by the agreement contingent upon a showing of majority support for representation by the Union. The operative provisions thus presuppose that the signatory employer possesses sufficient authority over the operation to guarantee union recognition upon the requisite showing and, subsequently, the application of the collective-bargaining agreement. Similarly, the subject provision requires a signatory "not to coerce employees or otherwise interfere with employees in their decision" whether to be represented, again assuming that the signatory exercises control over covered operation's employees sufficient to create a danger that it might coerce the employees.⁶ Under these circumstances, we agree with the judge that the phrase "establish or maintain" limited the effect of addendum C to those entities controlled by signatory employers.

Contrary to the General Counsel, the Charging Party, and the dissent, our decision in *Alessio*, supra, does not require a different result. In *Alessio*, the Board found unlawful an anti-dual-shop provision requiring the application of the collective-bargaining agreement when "partners, stockholders or beneficial owners of the" signatory employer merely "participate[d] in the formation of another company" performing bargaining unit work within the union's jurisdiction. 310 NLRB at 1023.

to reach such a situation. Indeed, the tense of the contractual language—"should the employer establish"—strongly suggests it applies only to action taken after execution of the agreement. A different case would be presented if the Union had sought to enforce addendum C where the signatory employer no longer exercised control over an entity it had once established. This is the situation envisioned in the dissent, but it is not at issue here.

In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages in or will engage in the same or similar type of business enterprise in the jurisdiction of this

⁴ The dissent, contrary to this controlling precedent, takes the opposite approach, asking whether it is possible for the clause to be construed to require unlawful action.

⁵ It is conceivable that a signatory employer might have established an entity and then divested itself of control of the entity before the contract term, without ever having maintained the entity during the contract term. But there is no compelling reason in this case, which involves a facial challenge to the contract clause, to read addendum C

⁶ The dissent analyzes only one phrase in the Addendum without reference to these other relevant provisions.

⁷ The disputed clause in *Alessio* provided that:

Thus, the Board found that the plain language of the proposed clause went beyond entities controlled by the signatory employer to reach entities linked to the signatory only by common ownership (or less). Id. at 1026, 1026 fn. 15.8 Because the clause did "not require that the signatory employer control or manage the affiliates covered by the provision," the Board concluded that "it would reach companies performing work that was not within the signatory's 'right of control.'" Id. at 1026. The clause thus had an unlawful secondary "objective of affecting the labor relations between the nonunion affiliated companies and their employees over which Alessio has no right of control." Id. at 1025. In contrast, addendum C, on its face, does not apply to entities merely based on common ownership. Rather, as we explained above, the signatory employer—not merely a partner, stockholder or beneficial owner of the employer—must "establish or maintain" the subject operation.

Rather than being controlled by the holding in *Alessio*, we find the contractual language at issue here to be more similar to that upheld by the Board in Manganaro. The Board explained that the clause at issue in the latter case, "[b]y its terms . . . applies to the [signatory] 'Contractor' if it 'performs . . . work . . . covered by this Agreement, under its own name or the name of another, . . . wherein the Contractor . . . exercises directly or indirectly . . . management, control, or majority ownership." NLRB at 164. This language, like the language challenged here and unlike the language at issue in Alessio, focuses on the signatory employer and its relation to the operation performing bargaining unit work, rather than on the signatory employer's owners' relation to the operation. The Board found that the language in question in Manganaro "requires that the signatory must have effective, albeit indirect, management, control, or majority ownership." Id. at 165. As we explained above, we find the operative language of in addendum C requires a similar "effective control" over the operation performing bargaining unit work. Indeed, in Manganaro, the Board spoke directly to contractual provisions containing precisely the language at issue here:

certain union employers in the construction industry do "form[], acquire[], or maintain[] a separately managed nonunion company that performs work of the same type as that performed by the affiliated union com-

Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract.

pany." In some situations, employers use this separately managed company, or dual-shop, to perform-work of the type covered by the union contract at a lower cost. Seeking to preserve this work for unit employees is a legitimate goal to preserve work traditionally performed by unit employees.

Id. at 166 (emphasis added). *Manganaro* thus strongly supports our holding here.

The General Counsel presented only limited extrinsic evidence regarding the negotiation of addendum C and no evidence concerning its application. The evidence is inconclusive regarding the intent behind the provision. As mandated by *J.K. Barker*, to the extent that the clause is ambiguous, we cannot presume it to be unlawful in the absence of extrinsic evidence indicating it was intended to be or has been administered in violation of Section 8(e). Therefore, we cannot find addendum C to be unlawful.

We also reject the General Counsel's argument that the existence of the first provision of addendum C suggests that the second provision applies to entities not controlled by the signatory and thus that it serves a secondary purpose. Instead, we find that addendum C protects unit work through a "belt and suspenders" approach. The first clause requires the Employer to apply the contract to an entity if the entity and the signatory employer are either a single employer or joint employers of employees performing bargaining unit work. The second clause anticipates the possibility that a signatory employer could establish or maintain an operation to perform unit work while avoiding the terms of the contract, but without an arbitrator finding that it exercised the common control over terms and conditions of employment that the arbitrator might deem necessary to a single or joint-employer finding under the contract. The second provision essentially requires that the signatory exert the control that it possesses, by granting recognition upon the requisite showing of majority support and, subsequently, applying the contract.9

R

Finally, we agree with the judge that addendum C does not require a signatory to cease doing business with anyone. The Board has held that "an agreement to cease doing business with someone, by the signatory employer, is [] a prerequisite for finding a violation of Section 8(e)." *Heartland Industrial Partners*, 348 NLRB 1081 (2006). But the language of addendum C simply re-

⁸ The dissent finds *Alessio* controlling, but does not analyze the full reach of the clause at issue in that case.

⁹ For this reason, we find the loss of the arbitration under the first proviso, cited in the dissent, to be irrelevant.

¹⁰ Review denied sub nom. *Kandel v. NLRB*, 265 Fed. Appx. 1 (D.C. Cir. 2008). In *Heartland*, an acquisitions firm had agreed with the

quires a signatory to exercise its control over operations it establishes or maintains in order to comply with the terms of the clause for the lawful object of preserving unit work. addendum C does not expressly require the signatory to cease doing business with any operation. Indeed, given our construction of addendum C, such a refusal would not be possible. See *Heartland*, supra at 1085 (signatory's control insured covered entities' compliance and thus rendered suggestion that clause had cease-doing-business objective implausible). Even if the signatory failed to insure compliance in respect to a particular covered operation, nothing in the addendum suggests that an arbitrator could order the signatory to cease doing business with the operation as a remedy. 11 Thus, consistent with Heartland, we cannot find a cease-doingbusiness objective. Id. at 1084.¹²

III. CONCLUSION

We find that addendum C does not have a secondary objective. In construing the provision to require no more than is permitted by law, we find that the provision requires a signatory employer to recognize the Union upon specified proof of majority support and then apply the terms of the collective-bargaining agreement within an operation performing bargaining unit work only to the extent that the signatory controls the operation. As such, we find that the provision possesses the primary objective of preserving unit work and not the secondary objective of achieving union objectives elsewhere. In addition, we find that the provision does not possess a ceasedoing-business objective. We accordingly find that the General Counsel has not established that the challenged clause violates Section 8(e), and we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 30, 2011

union that it would oblige its "controlled business entities" to remain neutral in the unions' organizing drive and to recognize and bargain with the union should it demonstrate majority support through signed authorization cards.

Mark Gaston Pearce,	Chairman
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Unlike my colleagues, I find that the second part of addendum C, an antidual shop provision in the 2007–2010 bargaining agreement between the Union and the National Fire Sprinklers Association, has both a secondary objective and a proscribed cease-doing-business objective, and that it is not saved by the construction industry proviso of Section 8(e). I therefore find that the provision violated Section 8(e) of the Act, as alleged in the complaint.

With respect to the secondary objective issue, my colleagues find that the disputed language does not on its face clearly extend to entities outside the signatory employer's control because the phrase "establish or maintain" indicates that the signatory employer exercises control over covered operations. I disagree. I note initially that the terms appear in the disjunctive, so that addendum C would apply in the event a signatory employer either established or maintained another business entity. An employer can establish another entity without thereafter exercising continuing control over it. This is quite common, for example, in the case of company "spinoffs." Similarly, an employer can maintain another entity, financially for example, without controlling its daily operations and the work of its employees. If the financing were to cease, the recipient of such funding would simply have to look elsewhere for funding.

In my view, the instant case is controlled by Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023 (1993), rather than Painters District Council 51 (Manganaro Corp., Maryland), 321 NLRB 158 (1996), on which the majority relies. In Manganaro, the language found to have a lawful work preservation objective referred to a signatory that "exercises directly or indirectly . . . management, control or majority ownership . . ." 321 NLRB at 161-162. By contrast, in Alessio, the provision found to have a secondary objective contained the phrase "form or participate in the formation of another company." 310 NLRB at 1026. The Board found that the disputed provision was not limited to a signatory employer who could control or manage the affiliates covered by the provision. As noted above, the language at issue in the instant case suffers

Again, the dissent reads the clause otherwise, but in the unlikely event the clause is read to require the signatory to cease doing business with another entity, as the dissent suggests, an as-applied charge might lie at that time.

¹² As we are dismissing the complaint based on addendum C lawfully seeking to preserve unit work, we agree with the judge that it is unnecessary to determine whether the clause comes within the construction industry proviso of Sec. 8(e).

from the same defect on its face. Accordingly, the provision goes beyond the valid primary objective of unit work preservation and aims at affecting the labor relations between nonunion companies and their employees over which employers signatory to the bargaining agreement including Amendment C have no control.

I note that, although the provision on its face has a secondary objective, it seems hardly coincidental that the provision was added in negotiations after the Union lost an arbitration in which it had sought to have nonunion Firetrol Protection Systems declared a single or joint employer with Charging Party Cosco, a signatory employer. In my view, this fact underscores the importance, in a secondary objective analysis, of focusing on the control of another employer's employees, rather than another type of corporate relationship that leaves the nonsignatory employer in control of its own employees. In sum, because the right to control criterion is not satisfied here, the disputed provision has a secondary objective.

I further disagree with my colleagues' finding that the language at issue here does not expressly require a signatory to cease doing business with anyone. It is clear that the Union may employ all lawful means to compel Cosco's compliance with addendum C. Accordingly, if an employer established or maintained by Cosco, *but not controlled by it*, were to refuse to recognize the Union based on a majority showing of authorization cards, Cosco could apparently avoid monetary damages for breach of contract only by ceasing to do business with that entity. Thus, contrary to my colleagues, the language in dispute has a cease-doing-business objective.¹

Unlike the judge or my colleagues, I must further address whether addendum C, even with its secondary objective and proscribed cease-doing-business objective, is nevertheless protected by the construction industry proviso to Section 8(e). I find that it is not protected. As the Board explained in *Alessio*, the reach of the pro-viso is properly understood to be limited to subcontracting agreements similar to those in existence in 1959, when Section 8(e) was enacted. 310 NLRB at 1026–1029.

Reviewing the legislative history, the Board found that Congress sought to immunize two practices: the subcontracting of work by a signatory to a nonunion operation, and an agreement requiring a signatory to refrain from requiring its union employees to work alongside nonunion employees on a jobsite. Id. at 1029. In contrast, an antidual shop provision, the type of provision involved in both Alessio and the instant case, seeks to apply a collective-bargaining agreement to nonsignatory employers related to a signatory employer by common ownership. Id. at 1027. The Board stated that the proviso exempted agreements seeking to bind entities in a "vertical" relationship on a common worksite tor/subcontractor), rather than entities in a "horizontal" relationship where the entities do not have employees working on a common worksite (entities linked only by common ownership, not control). In Alessio, the Board found the union's antidual shop clause unprotected by the proviso, in light of the absence of evidence that Congress intended the proviso to protect such clauses, which differed substantially from those in existence in 1959. Id. at 1029. As was the case in Alessio, there is no indication here that the provision at issue empowers a signatory to subcontract work on a common worksite. Because the instant provision, like the one involved in Alessio, is not of the type that Congress intended to exempt, the proviso does not save the disputed provision, and the violation of Section 8(e) is established.

In sum, contrary to the judge and my colleagues, I would find that addendum C in the 2007–2010 nation-wide multiemployer collective-bargaining agreement between the Union and the National Fire Sprinkler Association violated Section 8(e).

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

¹ Accordingly, as even my colleagues would seem to acknowledge, the rationale of *Heartland Industrial Partners*, 348 NLRB 1081 (2006), is inapposite because the finding there of no "cease doing business" objective was contingent on a finding that the signatory employer exercised control over business entities subject to the contract provision at issue. It would therefore be able to require their compliance with the contract, rather than cease doing business with them, in order to avoid legal or economic action by the union.

² The proviso states

Nothing in this subsection [8(e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

APPENDIX

ADDENDUM C

TO THE

NATIONAL FIRE SPRINKLER ASSOCIATION, INC.

AND

ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, COLUMBIA, MARYLAND
OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES
OF THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES & CANADA

PRESERVATION OF BARGAINING UNIT WORK:

In order to protect and preserve for the employees covered by this agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this agreement as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of [the Union], under its own name or under the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, where the Employer (including its officers, directors, owners, partners or stockholders) exercises either directly or indirectly (such as through family members) controlling or majority ownership, management or control over such entity, the wage and fringe benefit terms and conditions of this agreement shall be applicable to all such work performed on or after the effective date of this agreement. The question of single Employer status shall be determined under applicable NLRB and judicial principles, i.e., whether there exists between the two companies an arm's length relationship as found among unintegrated companies and/or whether overall control over critical matters exists at the policy The parties hereby incorporate the standard adopted by the Court in Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975) and affirmed by the Supreme Court, 425 U.S. 800 (1976), as controlling. A joint employer, under NLRB and judicial principles, is two independent legal entities that share, codetermine, or meaningfully affect labor relations matters.

Should the Employer establish or maintain such other entity within the meaning of the preceding paragraph, the Employer is under an affirmative obligation to notify the Union of the existence and nature of and work performed by such entity and the nature and extent of its relationship to the signatory Employer. The supplying of false, misleading, or incomplete information (in response to a request by the Union) shall not constitute compliance with this section. The Union shall not unreasonably delay the filing of a grievance under this Article.

In the event that the Union files, or in the past has filed, a grievance under Article 3 of this or any prior national agreement, and the grievance was not sustained, the Union may proceed under the following procedures with respect to the contractor(s) involved in the grievance:

Should the Employer establish or maintain operations that are not signatory to this agreement, under its own name or another or through another related business entity to perform work of the type covered by this agreement within the Union's territorial jurisdiction, the terms and conditions of this agreement shall become applicable to and binding upon such operations at such time as a majority of the employees of the entity (as determined on a state-by-state, regional, or facility-by-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards, pursuant to applicable NLRB standards, or in the event of a good faith dispute over the validity of the authorization cards, pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of the ratification of this agreement. The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election.

Particular disputes arising under the foregoing paragraphs shall be heard by one of four persons to be selected by the parties (alternatively depending upon their availability) as a Special Arbitrator. The Arbitrator shall have the authority to order the Employer to provide appropriate and relevant information in compliance with this clause. The Special Arbitrator shall also have authority to confirm that the Union has obtained an authorization card majority as provided in the preceding paragraph.

Because the practice of double-breasting is a source of strife in the sprinkler industry that endangers mutual efforts to expand market share for union members and union employers, it is the intention of the parties hereto that this clause be enforced to the fullest extent permitted by law.

Except as specifically provided above, it is not intended that this article be the exclusive source of rights

or remedies which the parties may have under State or Federal Laws.

Cecelia Valentine, Esq., for the General Counsel.
Alan R. Berkowitz, Esq. (Bingham McCutchen LLP), of San Francisco, California, for the Charging Party.
William W. Osborne, Esq. and Jason J. Valtos, Esq. (Osborne Law Offices), of Washington D.C for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on September 22, 2008. The charge and first amended charge were filed by Cosco Fire Protection, Inc., (Cosco) on July 10 and July 24, 2007 and the complaint was issued July 29. The complaint as amended alleges that, on or about April 14, the Road Sprinkler Fitters, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local 669 (Union) and Cosco, through its membership in the National Fire Sprinkler Association (NFSA) entered into a collective-bargaining agreement containing a clause prohibited by Section 8(e). The Union filed a timely answer that was modified at the hearing and admitted the allegations in the complaint concerning the filing and service of the charge, jurisdiction, and labor organization status.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Charging Party, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Cosco, a corporation, with its principal place of business located in Orange, California, and operations in California, Washington, Oregon, and Alaska, has been engaged as a contractor in the construction industry performing the inspection, installation, and repair of fire suppression devices and alarms. During the calendar year ending December 31, 2006, a representative period, Cosco, in conducting these business operations, purchased and received at its Orange, California, facility goods valued in excess of \$50,000 directly from points located outside the State of California. The Union admits and I find that Cosco is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Cosco is owned by Consolidated Fire Protection, LLC (Consolidated). Consolidated also owns Firetrol Protection Systems, Inc. (Firetrol). Firetrol, like Cosco, is a contractor in the construction industry performing the inspection, installation, and

repair of fire suppression devices and alarms. However, Firetrol is a Utah corporation with operations in Utah, Texas, Colorado, and Arizona.

NFSA is an organization of employers who are engaged in the installation, inspection, and repair of fire suppression devices and alarms throughout the United States. NFSA represents its employer-members in collective bargaining with the Union. Alexander Gettler is vice president of industrial relations and director of human resources for NFSA. Cosco is a member of NFSA, Firetrol is not. Through its membership in NFSA, Cosco is bound by a collective-bargaining agreement between the Union and NFSA as part of a multiemployer bargaining unit effective April 1, 2007 through March 31, 2010. addendum C to that agreement, set forth below, contains the language at issue in this case. The first portion of that language is conceded by the General Counsel to be a lawful work preservation provision; it is the second portion of addendum C that the General Counsel contends violated Section 8(e).

PRESERVATION OF BARGAINING UNIT WORK:

In order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of Local 669, (under its own name or the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, where the Employer (including its officers, directors, owners, partners or stockholders) exercise either directly or indirectly (such as through family members) controlling or majority ownership, management or control over such entity, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement. The question of single Employer status shall be determined under applicable NLRB and judicial principles, i.e., whether there exists between the two companies an arm's length relationship as found among unintegrated companies and/or whether overall control over critical matters exists at the policy level. The parties hereby incorporate the standard adopted by the Court in Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975) and affirmed by the Supreme Court, 425 U.S. 800 (1976), as controlling. A joint employer, under NLRB and judicial principles, is two independent legal entities that share, codetermine, or meaningfully affect labor relations matters.

Should the Employer establish or maintain such other entity within the meaning of the preceding paragraph, the Employer is under an affirmative obligation to notify the Union of the existence and nature of and work performed by such entity and the nature and extent of its relationship to the signatory Employer. The supplying of false, misleading, or incomplete information (in response to a request by the Union) shall not

¹ That same day the Board issued an Order denying a motion for summary judgment that the Union had filed.

² All dates are in 2007 unless otherwise indicated.

constitute compliance with this section The Union shall not unreasonable delay the filing of a grievance under this Article. The foregoing portion is admittedly lawful. This language, or substantially identical language, has existed in prior collective-bargaining agreements between the Union and NFSA. On about September 9, 2004, the Union filed a grievance against Cosco. Among other things, the grievance asserted that the terms of the agreement should be applied to Firetrol because it and Cosco were a single employer or joint employer. Arbitrator Ira Jaffe heard the grievance in June 2005, and on April 26, 2006, he issued an Arbitration Award denying the grievance in pertinent part and concluding that Cosco and Firetrol were separate employers commonly owned by Consolidated. Continuing with the language of addendum C:

In the event that the Union files, or in the past has filed, a grievance under Article 3 of this or any prior national agreement, and the grievance was not sustained, the Union may proceed under the following procedures with respect to the contractor(s) involved in the grievance:

Should the Employer establish or maintain operations that are not signatory to this Agreement, under its own name or another or through another related business entity to perform work of the type covered by this agreement within the Union's territorial jurisdiction, the terms and conditions of this agreement shall become applicable to and binding upon such operations at such time as a majority of the employees of the entity (as determined on a state-by-state, regional, or facilityby-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards, pursuant to applicable NLRB standards or in the event of a good faith dispute over the validity of the authorization cards," (as correctly set out in "Appendix A") pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of the ratification of this Agreement. The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election. . . .

Because the practice of double-breasting is a source of strife in the sprinkler industry that endangers mutual efforts to expand market share for union members and union employers, it is the intention of the parties hereto that this clause be enforced to the fullest extent permitted by law. . . .

The forgoing language was added to the most recent collectivebargaining agreement and is at issue in this case.

B. Analysis

Section 8(e) generally prohibits agreements between employers and unions that require the employer to cease doing business with any other person. But Supreme Court decisions instruct that this language is not to be taken literally but instead must be applied only to those agreements that have secondary, and not primary, objectives. *NLRB v. Longshoremen ILA*, 477 U.S. 490 (1980); *NLRB v. Pipefitters*, 429 U.S. 507 (1977);

National Woodwork Mfrs. Assn., 386 U.S. 612 (1967). In general, a primary objective is one that seeks to preserve unit work while a secondary objective is one that seeks to expand union goals into nonunit work. Even if the agreement has a work preservation objective, the employer subject to the agreement must have the right to control the flow of unit work; if the employer lacks such control then the objective is deemed secondary. NLRB v. Longshoremen ILA, supra.

In Carpenters District Council of Northeast Ohio (Alessio Construction), 310 NLRB 1023 (1993), the Board addressed the issue of whether a union violated Section 8(b)(3) by insisting to impasse on the inclusion of the following language in a collective-bargaining agreement that would violate Section 8(e):

In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of in the jurisdiction of this Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract.

The union in that case argued that the clause fell within the construction industry proviso to Section 8(e). The Board concluded that the provision fell within the literal meaning of Section 8(e) because it was calculated to cause Alessio to sever its ownership relationship with affiliates that sought to remain nonunion. Next the Board concluded that the provision did not seek to preserve unit work for the union but rather sought to acquire work the union had not traditionally performed. In this regard the Board pointed to the absence of any language in the provision regarding unit work. The Board also concluded that the provision would apply even in situations where an employer did not have the right to control the flow of unit work. The Board then addressed whether the provision fell within the construction industry proviso to Section 8(e). The Board strictly construed the scope of the proviso and concluded that the provision was not of a type that Congress intended to be covered by the proviso.

In Alessio is Painters District Council 51 (Manganaro Corp.), 321 NLRB 158 (1996) the disputed provision read:

Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs onsite construction work of the type covered by this Agreement, under its own name or the of another, is a corporation, company, partnership,, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners, or stockholders exercises directly or indirectly (including but not limited to management, control or majority ownership through family membership) management, control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

The Board concluded that the provision was facially lawful in that it covered unit work in circumstances where the employer controlled that work.³

Applying these cases to the agreement at issue here, I first conclude that the language is designed to apply to business entities that perform unit work. The language "to perform work of the type covered by this agreement within the Union's territorial jurisdiction" is almost identical to the language in Manganaro that the Board found was directed at unit work. It follows that the agreement has a work preservation objective. Next, the agreement on its face applies only when a signatory employer establishes or maintains operations that perform unit work. On its face this language clearly can be read to satisfy the "right to control" test. The General Counsel argues that the "establish or maintain" language cannot be read to require control, but he cites no case on point. The Charging Party argues that the agreement lacks the requisite element of control because it could apply to situations where a signatory employer establishes another employer but thereafter relinquishes the ability to control the flow of unit work of the newly established employer. But in assessing the facial validity of a clause:

Settled Board law requires us to construe a challenged clause "to require no more than what is allowed by law" when it is not "clearly unlawful on its face." General Teamsters, Local 982 (J. K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971). (Emphasis added.)

Heartland Industrial Partners, 348 NLRB 1081, 1084 (2006).

The Charging Party also contends that:

[H]ad the Union continued its efforts to impose Cosco's Contract on Firetrol in view of this finding of separateness by the arbitrator, such conduct would violate Section 8(b)(4) of the Act

The General Counsel makes a similar argument. However, there is no such allegation in the complaint nor is there any evidence in the record that the Union has sought to apply the agreement against Firetrol. I therefore cannot resolve that issue. *Central Pennsylvania Regional Council of Carpenters (Novinger's, Inc.)* 337 NLRB 1030 (2002).

The General Counsel points to the fact that the Union can use the disputed agreement only after it has filed and lost a grievance under the other section of the collective-bargaining agreement I have described above. From this the General Counsel argues that the agreement must therefore violate Section 8(e). I disagree; the language simply reflects an ordering of the grievances to be filed. I conclude that on its face the agreement is a lawful work preservation agreement.

Alessio is readily distinguishable from this case. The contested provision here applies only to entities that "perform work of the type covered by this agreement." Again, this means it applies only to unit work. The aim of the clause is primary in purpose; it does not seek to acquire work of a type not covered by the contract. In addition, the contested provision applies only to entities that are established or maintained by a signatory employer. Again, this language clearly may be read to require the employer to have the right to control the flow of unit work.

The fact that the application of the agreement is limited to circumstances where the Union establishes its majority status does not alter this result; instead, it assures the development of a Section 9(a) relationship. In reaching this result I also consider Heartland Industrial Partners, 348 NLRB 1081 (2006). In that case the challenged agreement applied to business entities controlled by the employer, as specifically defined in the agreement. In general, the agreement allowed the union to organize the controlled business entities while the business entities took a position of neutrality regarding the organization effort. If and when the union gained majority support among the employees then the agreement required the business entity to recognize and bargain with the union. The Board found that the challenged agreement did not require any cessation of business between the employer and the business entities and thereby did not violate Section 8(e). In the process, the Board rejected the notion that the recognition requirement of the agreement was tantamount to a cease doing business objective. The Charging Party would distinguish Heartland on the basis that it involved a parent company and the General Counsel makes a similar argument, but there is no indication that the Board intended so limited a holding, at least in this case where the agreement applies only to employers established or maintained by the signatory employer.

In light of my decision that the agreement has a lawful work preservation objective, I find it unnecessary to decide whether the agreement would nonetheless be lawful under the construction industry proviso to Section 8(e) even if it had unlawful objective.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁴

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 3, 2008

³ Because this case, like *Manganaro*, involves only a challenge to the facial legality of the agreement, I ruled that I would not allow litigation of the issue of whether Cosco and Firetrol was a single employer, as originally plead in the complaint. *Manganaro*, id. at 167, fn. 33.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.